U.S. Department of Labor

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Issue date: 30Aug2000

CASE NO.: 2000-ERA-00023

In the Matter of:

JEROME REID
Complainant

v.

NIAGARA MOHAWK POWER CORP.
Respondent

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

I. Statement of the Case

This proceeding arises under the employee protection provisions of the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. §5851, and the regulations promulgated thereunder at 29 C.F.R. Part 24. The matter is now before me on a request for hearing filed in August 1993 by Jerome Reid (the "Complainant") and on a motion to dismiss filed by Niagara Mohawk Power Corporation (the "Respondent"). Because I find for the reasons set forth below that the Complainant has failed to diligently pursue his complaint under the ERA, thereby resulting in prejudice to the Respondent, I have concluded that the Respondent's motion to dismiss should be granted.

II. Background

The Complainant has filed two complaints with the Department of Labor against the Respondent under Section 211 of the Energy Reorganization Act ("ERA"), only the second of which is

at issue before me.[1] In this second complaint, the Complainant alleges that the Respondent discriminated against him in violation of the ERA by paying him a lower rate of pay than he had previously been receiving. ALJX 5, Exhibit C.[2] On July 2, 1993, the Department's Wage and Hour Division notified the Respondent that the complaint would be processed and investigated pursuant to the provisions of 29 C.F.R. Part 24. ALJX 5 at Exhibit D. The Wage and Hour Division conducted an investigation and found that the challenged personnel action was not discriminatory. A determination letter was mailed to the Complainant on July 30, 1993, informing the Complainant of his right to an administrative hearing and instructing that any request for hearing must be made by telegram to the Chief Administrative Law Judge. ALJX 5 at Exhibit E.

While it is undisputed that the Claimant never sent a telegram to the Chief Administrative Law Judge, it now appears from recent correspondence that the Complainant did make a request for a hearing via facsimile transmission to the Office of Administrative Law Judges ("OALJ") on August 21, 1993. However, because the Complainant sent his request to a facsimile machine in the OALJ administrative office, rather than to the facsimile number for the Docket Section, it further appears that the request never reached the Docket Section and, therefore, was not docketed at that time. The matter lay dormant for almost seven years until April 27, 2000 when OALJ received correspondence from the Complainant inquiring into the status of his case. In this correspondence, the Complainant included a copy of his hearing request and a facsimile transmittal confirmation report which reflected that a document had been transmitted successfully to OALJ on August 21, 1993. ALJX 2.[3] On May 1, 2000, Associate Chief Judge Thomas M. Burke issued a Notice of Docketing in which he determined that although OALJ had no record of having ever received the Complainant's August 21, 1993 request for hearing, the transmittal confirmation report was adequate proof to show that

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[1] The Complainant filed his first complaint on September 17, 1992. On October 15, 1992, The Assistant District Director of the Wage and Hour Division issued a determination that prohibited discrimination did not take place as alleged in the complaint. The Complainant timely requested a hearing, and a hearing was held before Administrative Law Judge Ainsworth Brown on June 29, 1993. On August 9, 1993, Judge Brown issued a Recommended Order of Dismissal of Complainant Without Prejudice and Denial of Motion for Summary Decision, dismissing the complaint due to Complainant's failure to appear at the hearing. The Secretary affirmed Judge Brown's Order by Final Order of Dismissal issued on February 14, 1994. *Reid v. Niagara Mohawk Power Corp*., 1993-ERA-3.

[2] The documentary evidence in the record will be referred to herein as "ALJX" for the formal papers offered by the administrative law judge, "CX" for exhibits offered by the Complainant, and "RX" for exhibits offered by the Respondent. References to the hearing transcript will be designated as "TR".

[3] Also attached to the Complainant's letter to the Chief Administrative Law Judge was a copy of a letter dated December 16, 1999 which the Complainant had sent to the Wage and Hour Division inquiring into the status of his request for hearing.

Complainant's hearing request was timely filed. ALJX 3. Accordingly, the matter was docketed and assigned to me for hearing.

After I issued a notice of hearing in the matter, the Respondent filed a request on May 27, 2000, supported by the affidavit of its counsel and a memorandum of law, that I issue an order to show cause why the complaint should not be dismissed and why the initial determination rendered by the Wage and Hour Division on July 30, 1993 should not become the final order of the Secretary of Labor in this matter. In support of its request, the Respondent asserted that the Complainant had (1) failed to request a hearing on his complaint in the form and manner prescribed by the governing regulations and (2) failed to diligently pursue his appeal, resulting in a delay of almost seven years and potentially prejudicing the Respondent's ability to present a defense. ALJX 5. On May 30, 2000, I issued an Order To Show Cause, stating that the Complainant would be allowed to respond on the record at the hearing scheduled for June 6, 2000. ALJX 6. On May 31, 2000, the Complainant requested a continuance of the hearing due to the pendency of related proceedings before the New York State Division of Civil Rights ("NYSDCR") and the Equal Employment Opportunity Commission ("EEOC"). ALJX 7. By letter dated June 1, 2000, counsel to the Employer responded in opposition to the Complainant's request for continuance, stating that the hearing before the NYSDCR had been scheduled for the week of May 30 through June 1, 2000 but had subsequently been adjourned because the Complainant was not prepared to proceed. ALJX 8. Based on this information, I notified the parties by telephone that the request for continuance was denied and that the hearing would proceed as scheduled.

A hearing was conducted before me in Syracuse, New York on June 6, 2000 at which time both parties were afforded an opportunity to present evidence and argument. The Complainant appeared *pro se*, and an appearance was made by counsel on behalf of the Respondent. I denied in part the Complainant's request for a continuance so that he could obtain counsel based on my determination that he had sufficient time in the seven years that the matter had been pending to obtain counsel, and I ordered that the hearing would proceed with the Complainant's response to the Respondent's assertion that his complaint should be dismissed. The Complainant made his response to the Respondent's assertions, and the Respondent moved for dismissal of the complaint. After providing both parties with a full opportunity to be heard on the question of whether the complaint should be dismissed, I announced that I would take these matters under advisement, and I continued the hearing on the merits of the complaint pending a ruling on the Respondent's motion to dismiss.

Answering the Respondent's motion to dismiss, the Complainant stated that he has no legal training or expertise with the complaint procedures under the ERA. Regarding his request for hearing, the Complainant stated that he had communicated with an attorney named Ms. Duncan in OALJ who provided him with the facsimile machine number that he used to file his request. He stated that he had previously submitted information to OALJ using this facsimile number, and no problem had been raised. TR 35-36. In addition, he called OALJ and left a message that he was faxing the hearing request. TR 38. The Complainant further stated that he normally does a pretty good job about keeping track of records and in keeping up with things, so he was rather surprised to hear that he had not contacted

OALJ in seven years when he knows that he had been calling "on and off about the record." TR 38-39. In this regard, he said that he had spoken to a "technician or someone in that office in regards to my . . . complaint" but was not provided with any information. TR 41-42. When asked why he had not submitted a copy of his hearing request and facsimile confirmation report earlier before April 2000, the Complainant stated that this had not occurred to him, probably because he was communicating with OALJ by telephone. TR 41. Although his prior ERA complaint was scheduled quickly for hearing before Judge Brown, the Complainant explained that he did not consider it unusual that he heard nothing on his request for hearing in this matter for nearly seven years because he has been involved in other proceedings such as grievances and his discrimination complaint before the state civil right agency which have been pending for as long as ten years. TR 42-46. Finally, the Complainant stated that he was prompted in December 1999 (when he sent his initial inquiry to the Wage and Hour Division) to look into the status of his August 21, 1993 hearing request because he was preparing for the hearing on the case before the state civil rights agency and wanted to know the status of all related cases. TR 46-49.

The Complainant additionally stated that his protracted dispute with the Respondent have caused financial hardship for his family. He explained that he had nearly lost his home, that there was a dispute with the Respondent over his entitlement to disability benefits which is the subject of a pending grievance being handled by his union, that he had been out of work for several days on doctor's orders due to depression, stress and a cervical spine injury, and that he had been under psychiatric care since 1988. He is currently on prescribed medication (Thorazine and Nortriptyline) for stress and depression. He was hospitalized for these conditions in 1989, but has not been hospitalized since that time. TR 18-22, 26-28.

III. Issues Presented

The Respondent's motion to dismiss presents the following issues:

(1) whether the Complainant's request for a hearing was defective under the governing regulations, thus warranting dismissal; and

(2) whether the complaint is subject to dismissal for failure to prosecute.

IV. Discussion, Findings of Fact and Conclusions of Law

A. Adequacy of the Complainant's Request for Hearing

The Respondent contends that the complaint should be dismissed because of the Complainant's failure in August 1993 to request an administrative hearing via telegram, the form and manner prescribed by the governing procedural regulations during the time period applicable to Complainant's

request for a hearing.[4] Here, it is undisputed that the Complainant never sent a telegram to the Chief Administrative Law Judge and instead filed his hearing request by facsimile transmission which was never properly docketed. Indeed, complainants who rely on alternative means for delivery of hearing requests assume the risk that the request may be received beyond the due date and be untimely filed. *Staskelunas v. Northeast Utilities Co.*, 98-ERA-8 (ARB May 4, 1998), slip op. at 2. However, timeliness *per se* is not at issue in this matter. As Associate Chief Judge Burke determined in the May 1, 2000 Notice of Docketing, the transmittal confirmation report the Complainant submitted in April 2000 constitutes adequate proof that his hearing request was timely filed. Thus, the instant situation is distinguishable from the case relied on by the Respondent, *Crosier v. Westinghouse Hanford Co.*, 92-CAA-3 (ALJ Sept. 9, 1992) (dismissing as untimely a request for hearing which was filed late and by mailgram rather than by telegram), *aff'd*, (Sec'y January 12, 1994), and is more closely analogous to *Lazur v. U.S. Steel-Gary Works*, 1999-ERA-3 (ALJ May 18, 2000) (employer's request for hearing timely filed by first class mail rather than by the means specified in the applicable regulations). Noting that there was no prejudice where service of the hearing request was made on the opposing party within the regulatory time limits, Administrative Law Judge Donald W. Mosser concluded in *Lazur* that, as long as the hearing request reaches OALJ within the time limits, the manner of filing is not relevant. Slip op. at 14. *See also Daugherty v. General Physics Corp*., 92-SDW-2 (ALJ December 14, 1992) (discussing the doctrine of *substantial compliance* and concluding that filing of request for hearing via letter rather than telegram not grounds for dismissal). Based then on the rationale of *Lazur* and *Daugherty*, and noting that there is no contention made that the Complainant failed to serve his request upon the Respondent, I find that the Complainant's timely filing of his request for hearing by facsimile rather then telegram was in substantial compliance with the regulations. Accordingly, I conclude that the complainant is not subject to dismissal based on an untimely or procedurally defective hearing request.

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[4] During the time period applicable to Complainant's request for a hearing, the regulations provided:

> If on the basis of the investigation the Administrator determines that the complaint is without merit, the notice of determination shall include, or be accompanied by notice to the complainant that the notice of determination shall become, the final order of the Secretary denying the complaint unless within five calendar days of its receipt the complainant files with the Chief Administrative Law Judge a request by telegram for a hearing on the complaint. The notice shall give the address of the Chief Administrative Law Judge. 29 C.F.R. § 24.4(d)(2)(i) (revised as of July 1, 1993).

B. Failure to Prosecute

The Respondent further contends that, even assuming the timeliness of the Complainant's hearing request, dismissal of his complaint is nonetheless warranted because the Complainant's subsequent failure to pursue his case in a diligent manner has prejudiced the Respondent in its ability to present a full and complete defense. Specifically, the Respondent asserts that witnesses who have information relevant to the legitimate, nondiscriminatory reasons for the personnel action the Complainant is challenging in this matter have retired over the past seven years or have moved out of the area. In addition, the Respondent points out that those witnesses who remain within its control and who would appear at the hearing will have to testify based on their recollection of events that occurred more than seven years ago.

A complaint filed under the ERA may be dismissed based on a complainant's failure to prosecute. *Solnicka v. Washington Public Power Supply System*, ARB No. 00-009, ALJ No. 1999-ERA-19 (ARB April 25, 2000) (courts possess inherent power to dismiss a case for lack of prosecution), slip op. at 3, citing *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962). Thus, in *Guity v. Tennessee Valley Authority*, 90-ERA-10 (Sec'y January 4, 1994), a case which bears some similarities to the instant situation, the Secretary of Labor adopted the administrative law judge's recommendation that the complaint be dismissed where the complainant, owing to mental incapacity, had been unable to proceed for a period of four years. In *Guity*, the complainant timely requested a hearing after the Wage and Hour Division determined that his complaints could not be substantiated, and a hearing was soon thereafter scheduled before an administrative law judge. The administrative law judge then twice granted joint requests that the hearing be continued because the complainant's mental condition precluded him from prosecuting his complaints. However, after nearly two more years passed, the administrative law judge issued an order that the parties show why the case should not be set for hearing. The complainant responded seeking a continued stay of the proceeding which the administrative law judge denied, stating that while a complainant's mental condition is an ameliorating factor, the matter could not be continued indefinitely. The administrative law judge did allow the complainant 60 days to submit medical evidence on his mental capacity to proceed. The complainant submitted a statement from his psychologist who stated that the complainant was not then able to proceed without exacerbating his psychological problems but suggesting that he might be able to proceed in the future. Finding that the psychologist's statement did not indicate any reasonably foreseeable date when the matter could go forward, the administrative law judge recommended that the complaint be dismissed with the condition that the complainant be allowed to file a motion to reopen within one year supported by medical evidence of competence. With some modifications, the Secretary adopted the administrative law judge's recommendation, noting that the recommended provision for leave to seek reopening is a means to ameliorate the admittedly harsh sanction of dismissal with prejudice for failure to prosecute. Slip op. at 4. However, in approving the recommendation of dismissal without prejudice with conditional leave to move for reopening, the Secretary recognized the potential prejudice an opposing party could suffer from indefinite delay in proceeding to hearing:

> Although it is not necessary to show prejudice to the defendant as a basis for dismissal for failure to prosecute, *West v. City of New York*, 130 F.R.D. 522 (S.D.N.Y. 1990), I agree that the passage of time could hamper TVA's ability to prepare a defense. R.O.D. at 4. More than four years have elapsed since Guity filed his complaint, and the failure of memory or the dispersal of witnesses as they retire or obtain employment elsewhere could prejudice TVA.

Slip. Op. at 5 (citations in original). In this case, substantially more time has passed since the date of the hearing request than was the case in *Guity*, and over the period of nearly seven years that the case lay dormant, the Respondent had no notice that the Complainant had any intention to proceed with his complaint. Protracted delays such as this are contrary to the expedited processing of ERA cases envisioned by the applicable regulations.[5] And, should the Complainant be allowed to proceed now after years of inactivity, the Respondent would be forced to cobble together a defense with witnesses whose recollection of pertinent events are undoubtedly diminished by the passage of time. Moreover, in the case of witnesses who have left the Respondent's employment, the Respondent is without means to compel their attendance at a hearing since an administrative law judge has no authority to issue subpoenas under the ERA. *See Malpass v. General Electric Co.*, 85-ERA-38 and 39 (Sec'y March 1, 1994), slip op. at 21-22. In these circumstances, the prejudice to the Respondent palpable. On the other hand, the Complainant has only offered vague testimony that he made some "on and off" attempts over the years to inquire into the status of his case and spoke to a "technician or someone", and there is no evidence in the record which would support a finding that the Complainant's depression and stress, for which he has apparently been treated for more than a decade, incapacitated him to such an extent between 1993 and 2000 that he was unable to more diligently inquire into the status of his case. On these facts, I find that the Complainant has clearly failed to diligently pursue his case. Accordingly, I will recommend that his complaint be dismissed. I will further recommend that the dismissal be with prejudice in view of the prejudice the Respondent would face in further proceedings were permitted

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[5] The regulations governing the investigation and adjudication of whistleblower complaints, including those filed under the ERA, require action to be taken within extremely strict time limits. For example, within 30 days after the filing of a complaint, the Assistant Secretary of Labor must complete an investigation, determine whether a violation has occurred, and issue a notice of determination. 29 C.F.R. §24.4(d)(1). After issuance of this notice of determination, any party who desires review of the determination has five days within which to file a request for a hearing. 29 C.F.R. §24.4(d)(2). Within seven days after a party has filed a request for a hearing, the administrative law judge to whom the case is assigned is required to notify the parties of the day, time, and place of the hearing. 29 C.F.R. §24.6(a). These strict time limitations are intended to provide prompt adjudication of discrimination claims brought under the federal employee protection statutes in order to protect the rights of both complainants and respondents.

and in view of the absence of any evidence that the Complainant's failure to prosecute is excusable due to incapacity.

V. Order

IT IS RECOMMENDED that the Respondent's motion for dismissal be GRANTED and that the complaint filed in this matter be DISMISSED with prejudice.

A
Daniel F. Sutton
Administrative Law Judge

Camden, New Jersey

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).